Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matters of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
Alliance Contact Services, *et al.*, Joint Petition for Declaratory Ruling that the FCC Has Exclusive Regulatory Jurisdiction Over Interstate Telemarketing	)	DA 05-1346
	)	
American Teleservices Association, Inc., Petition for Declaratory Ruling with Respect to Certain Provisions of the New Jersey Consumer Fraud Act and the New Jersey Administrative Code	)	DA 04-3185
	)	
ccAdvertising Petition for Expedited Declaratory Ruling	)	DA 04-3187
	)	
Consumer Bankers Association Petitions for Declaratory Rulings with Respect to Certain Provisions of the Indiana Revised Statutes and Administrative Code and the Wisconsin Statutes and Wisconsin Administrative Code	)	DA 04-3835 DA 04-3836
	)	
National City Mortgage Co. Petition for Expedited Declaratory Ruling with Respect to Certain Provisions of the Florida Statutes	)	DA 04-3837
	)	
TSA Stores, Inc. Petition for Declaratory Ruling with Respect to Certain Provisions of the Florida Laws and Regulations	)	DA 05-342

COMMENTS OF TELE-RESPONSE CENTER, INC.

Robert Corn-Revere
Ronald G. London
Davis Wright Tremaine, LLP
1500 K Street, N.W., Suite 450
Washington, D.C. 20005-1272
(202) 508-6600

Counsel for Tele-Response Center, Inc.

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COMMENTS OF TELE-RESPONSE CENTER, INC.

Tele-Response Center, Inc. ("TCI") hereby responds to the Commission's request for comment on the captioned matters. [1] Though TCI is a party to the Joint Petitioners' Request,

[1] *Consumer & Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling Relating to Commission's Jurisdiction Over Interstate Telemarketing*, 20 FCC Rcd 8943 (CGB 2005) ("Joint Petitioners' Request"); *Consumer & Governmental Affairs Bureau Reopens Public Comment Period for Petitions for Declaratory Ruling Relating to Preemption of State Telemarketing*

which it incorporates by reference, it comments here to supplement that filing with additional information based on its experience with state telemarketing laws, and to comment on the State-Specific Petitions. For the reasons that follow, TCI submits that it is clear the Commission must grant the Joint Petitioners' Request for a declaratory ruling stating that the FCC's exclusive jurisdiction over interstate telemarketing calls divests states of authority to apply to such calls any state law or rule that imposes requirements or prohibitions that differ from the federal rules.

INTRODUCTION AND SUMMARY

This proceeding is necessitated by a severe case of frustrated expectations with respect to the anticipated unifying effects of the National Do-Not-Call Registry ("NDNCR") and related new telemarketing rules adopted in 2003. In creating the NDNCR, the Federal Trade Commission and this Commission envisioned a "single national do-not-call database" on which telephone subscribers may enroll to afford telemarketers a means of effectuating consumer preferences regarding unsolicited calls with "one visit to [the] database." [2] This Commission enacted the new regulations as part of a review of its rules implementing the Telephone Consumer Protection Act of 1991 [3] and to effectuate the Do-Not-Call Implementation Act. [4] It found that the NDNCR coupled with the retention of existing federal requirements for companies to maintain and honor internal do-not-call lists would "strike [the] appropriate balance between maximizing consumer privacy" and "avoiding … undue burdens on telemarketers." *NDNCR*

Laws, 20 FCC Rcd 8947 (CGB 2005) (reopening record on preemption petitions with respect to New Jersey, North Dakota, Indiana, Wisconsin and Florida state laws (the "State-Specific Petitions")).

[2] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, 14060 (2003) ("*NDNCR Order*").

[3] 47 U.S.C. § 227 ("TCPA").

[4] Pub. L. No. 108-10, 117 Stat. 557 (2003), *codified at* 15 U.S.C. § 6101. The Do-Not-Call Implementation Act required the FCC to consult and coordinate with FTC in order to "maximize consistency" with NDNCR rules the FTC promulgated, *id*. § 3, which it adopted in part to "harmonize the[ ] different systems" of telemarketing regulation that had been adopted by the various states. *Telemarketing Sales Rule, Final Rule,* 68 Fed. Reg. 4580, 4641 (2003) ("*FTC Order*").

Order, 18 FCC Rcd at 14017. *See also id*. at 14028-90. The FTC and FCC also enacted new rules governing predictive dialer use and other telemarketer practices as part of a newly enhanced federal regime regulating telemarketing. *See id*. at 14090-124.

In adopting the NDNCR, the FCC and FTC both asserted expectations that states with their own "do-not-call" registries would transfer their data to the NDNCR to obviate the need for consumers to register with multiple government lists and alleviate the "administrative burden" and cost to telemarketers of having to deal with more than one registry. *NDNCR Order*, 18 FCC Rcd at 14025-26, 14060-61; *FTC Order*, 68 Fed. Reg. at 4641. The *NDNCR Order* gave states 18 months as a "transition period" to accomplish the FCC's and FTC's unifying goals. *NDNCR Order*, 18 FCC Rcd at 14061. That "transition period" has since elapsed.

This Commission also made clear, as discussed in greater detail below, its expectation that states would apply the federal rules – and not their own laws if they "differ" from the FCC rules – to all interstate telemarketing. *Id*. at 14064-65. The Commission "reiterate[d] the interest in uniformity … recognized by Congress" and it "encourage[d] states to avoid subjecting telemarketers to inconsistent rules." *Id*. at 14065. However, rather than preempting wholesale the application of conflicting state rules to interstate telemarketing, the Commission adopted a case-by-case framework. *Id*. But it warned that "state regulation of interstate telemarketing calls that differs from [the FCC] rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted." *Id*. The teleservices industry in turn expected that, whatever obligations the new FTC and FCC rules presented, they at least finally would eliminate the patchwork of state registries and rules that had prevailed with respect to interstate telemarketing.

None of these expectations have been fulfilled. States continue to operate and demand compliance with their own registries, and some even have since tightened their do-not-

call laws in ways expressly designed to deviate from the federal rules. [5] About two-thirds of the states maintain registries, [6] yet notwithstanding the FTC's exhortations and the time limit this Commission established, it seems that only 17 of them have shared their data with the NDNCR. [7] At the same time, as shown in the Joint Petitioners' Request and State-Specific Petitions, and as discussed below, states continue to aggressively enforce their laws against interstate telemarketing, without regard to whether those rules differ from the federal regime. Meanwhile, this Commission has yet to rule on a single preemption petition under its case-by-case approach, even though some date back over a year, with at least one having been withdrawn after the petitioner had settle state claims because the FCC could not act in time to provide relief. [8] Clearly a better framework is needed to give effect to the *NDNCR Order*'s explication of the supremacy of federal rules over state law with respect to interstate telemarketing.

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[5] *See, e.g.*, http://www.in.gov/attorneygeneral/telephone/compare.html; American Teleservices Association, Inc., Petition for Declaratory Ruling with Respect to Certain Provisions of the New Jersey Consumer Fraud Act and the New Jersey Administrative Code, in CG Docket No. 02-278, filed Aug. 17, 2004, Exh. 1 at 3 FAQs 19-20 ("New Jersey Petition").

[6] *See* Government Accountability Office, Report to Congressional Committees, *Telemarketing; Implementation of the National Do-Not-Call Registry*, GAO-05-113, Jan. 2005, at 7 n.13 ("*GAO NDNCR Report*") (citing FCC accounting of state do-not-call lists).

[7] *See id*. at 8 n.15. The FTC claimed, in a letter responding to a draft of the *GAO Report*, that "[a]ll but eight of the states that maintain their own registries have shared their registration data" with the NDNCR, *see id*. App. III ("*FTC Letter to GAO*"), but neither the FTC nor GAO explain the apparent discrepancy in the foregoing figures. Nor does either of them provide any reasons, or offer any legal basis, why the remaining states have not shared their data with the NDNCR despite expectations of federal agencies that they do so, nor do they offer an estimate of when these states may be expected to comply with this Commission's command to share their do-not-call lists.

[8] *See Consumer & Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling on Preemption of California Telemarketing Rules*, 20 FCC Rcd 8954 (CGB 2005) (seeking comment on petition filed August 11, 2003); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 19 FCC Rcd 22943 ¶ 2 (CGB 2004), *granting withdrawal of petition in Consumer & Governmental Affairs Bureau Seeks Comment on Express Consolidation, Inc. Petition For Declaratory Ruling on Preemption of Florida Telemarketing Rules*, 20 FCC Rcd 967 (CGB 2004) (petition filed July 28, 2004). *Cf.*, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 20 FCC Rcd 1072 (CGB 2005) (granting withdrawal of preemption petition filed May 3, 2004). The delay of FCC action on the instant petitions persists even though some of them sought (in vain, it now appears) that their preemption requests receive expedited treatment.

I. THE COMMISSION MUST EFFECTUATE THE CLEAR INTENT OF CONGRESS TO PROMOTE A UNIFORM REGULATORY SCHEME FOR INTERSTATE TELEMARKETING

The narrow focus of this proceeding is to clarify the preemptive effect of the FCC's rules implementing the TCPA and its statements in the *NDNCR Order*. Contrary to inaccurate characterizations by consumer advocates, state officials or their constituents (who have been misled about the purpose of the instant petitions), this proceeding is not intended make new law or alter protections afforded consumers from unwanted calls. Indeed, neither the preemptive effect of the rules adopted in the *NDNCR Order* nor the Commission's intent to give them that effect are seriously in question. As the has Commission noted, its staff long ago advised that the TCPA "precludes [states] from regulating or restricting interstate … telemarketing calls." [9] Building on this, the *NDNCR Order* held that "by operation of general conflict preemption law, the federal rules … supersede all less restrictive state do-not-call rules" because they "frustrate Congress' … objectives in promulgating the TCPA," which were recognized as nationwide uniformity, protecting consumer privacy, avoiding confusion, and reducing administrative burdens on telemarketers. 18 FCC Rcd at 14060, 14063, 14065. In keeping with this view of "general preemption law," the Commission also held that "*any* state regulation of interstate telemarketing

[9] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 17 FCC Rcd 17459, 17496 n.220 (quoting Letter from Geraldine A. Matise, FCC, to Ronald A. Guns, Maryland House of Delegates, dated January 26, 1998 (citing 47 U.S.C. §§ 152(a), 152(b)(1), 153(22); *Operator Services Providers of America Petition for Expedited Declaratory Ruling*, 6 FCC Rcd 4475, 4476 (1991) ("*OSPA Ruling*")). *See also* 137 CONG. REC. S18781-02, S18784-02 (Nov. 27, 1991) ("Section 227(e)(1) clarifies that the [TCPA] is not intended to preempt State authority regarding intrastate communications" but "[p]usuant to the general preemptive effect of the Communications Act of 1934, State regulation of interstate communications, *including [that] initiated for telemarketing* … is preempted.") (emphasis added); 137 CONG. REC. H10339-01, H10342-01 (Nov. 18, 1991) ("To ensure a uniform approach …," the TCPA "would preempt inconsistent state law. From the industry's perspective, preemption has the important benefit of ensuring that [it is] not subject to two layers of regulation.").

calls" that "differs" from the FCC rules likewise "almost certainly would conflict with and frustrate the federal scheme," and therefore "almost certainly would be preempted." [10]

In establishing this preemptive effect for its rules, the Commission gave force to Section 227(e), which preserves "State law that imposes more restrictive *intrastate* requirements or regulations … or … prohibit[ion]s" on telemarketing. [11] It held that "[b]ecause the TCPA applies to both intrastate and interstate communications, the minimum requirements are … uniform throughout the nation." *NDNCR Order*, 18 FCC Rcd at 14063. Moreover, "states may adopt more restrictive do-not-call laws governing ***intra***state telemarketing" but "more restrictive state efforts to regulate ***inter***state calling" are precluded. *Id*. at 14063-64 (emphases added). By requiring that state rules be both more restrictive and apply only to intrastate calls, the Commission gave effect to congressional intent in that whatever power the TCPA leaves in the states' hands, nothing in Section 227(e) or any other TCPA provision conveys or even recognizes state authority over interstate telemarketing. This conclusion, which the instant petitions merely ask the Commission to reinforce, is consistent not only with the TCPA, but also with general preemption precepts [12] and the Commission's application of them in similar situations. [13]

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[10] *Id*. at 14064 (emphasis added). The *NDNCR Order* did not explain why the "operation of general conflict preemption law" required automatic preemption of less restrictive state laws on grounds that they frustrate federal objectives, while more restrictive state laws that result in the same kind of "frustration" do not also require automatic preemption. In any event, granting the instant petitions would render that inconsistency a moot issue.

[11] 47 U.S.C. § 227(e) (emphasis added).

[12] *See generally, e.g.*, *City of New York v. FCC*, 486 U.S. 57 (1998); *Louisiana PSC v. FCC*, 476 U.S. 355 (1986).

[13] For example, in the *OSPA Ruling*, the Commission made clear that it "has plenary and comprehensive jurisdiction over interstate and foreign communications, the regulation of which is entrusted" to the FCC, and that its "jurisdiction over interstate … communications is exclusive of state authority." 6 FCC Rcd at 4476-77. In finding that Section 226 divested states of jurisdiction, the Commission held that not even state claims to general jurisdiction to protect consumers against unfair, deceptive, and fraudulent practices survived Section 226, which regulates interstate operator services. *Id*. It also held that 47 U.S.C. § 414, which, like parts of Sections 227(e) and (f)(6) preserves certain state law, did not allow states to retain jurisdiction. *Id*. It is notable that, under both the provisions of Section 226 construed in the *OSPA Ruling* and the provisions of Section 227 at

Assertions made by some that the instant petitions seek to undermine protections in the federal rules regarding unsolicited calls are utterly false. Quite to the contrary, the Joint Petitioners' Request and State-Specific Petitions seek to ensure these rules are applied uniformly and consistently across the country, including by officials in every state that the TCPA empowers to enforce the federal rules. [14] In this regard, the FTC has indicated that the NDNCR and the concurrently adopted new federal rules have been effective. [15] Consequently, there is no basis for the claim that precluding states from enforcing their laws against interstate telemarketing will alter the protections of federal law or otherwise undermine consumer interests in avoiding unsolicited telemarketing calls.

The Commission should not be swayed from its objectives articulated in the *NDNCR Order* by state officials seeking to exercise powers beyond what the TCPA allows them, or by consumers these officials have mislead into believing protections against unwanted calls risk being dismantled. TCI has noted, as we are sure the Commission has as well, the thousands of brief filings from consumers in states implicated by the State-Specific Petitions (including a significant increase when the record recently reopened), all of which implore the denial of the instant petitions. TCI itself received about 500 emails form Indiana consumers in just a few days (and continues to receive numerous emails from Indiana residents), most of whom have been

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issue here, the FCC's jurisdiction is even stronger with respect to interstate communications than it is in many other contexts, as Sections 226 and 227 are among those explicitly excluded from Section 2(b) of Act, which generally preserves state authority to regulate intrastate communication. *See* 47 U.S.C. § 152(b) ("*Except as provided in sections 223 through 227* … nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to … intrastate communication") (emphasis added).

[14] *See NDNCR Order*, 18 FCC Rcd at 14063 ("all states have the ability to enforce violations of the TCPA, including do-not-call … , in federal district court") (citing 47 U.S.C. § 227(f)(1)).

[15] *See, e.g.*, FTC News Release, *Compliance with Do Not Call Registry Exceptional*, Feb. 13, 2004 (at http://www.ftc.gov/opa/2004/02/dncstats0204.htm); *FTC Letter to GAO, supra* note 7, at 1. *But see GAO NDNCR Report* at 22-24.

lead to believe there will be no more "do-not-call" protection if relief is granted here. This is utterly without merit, and public officials propagating this falsehood should be admonished.

These missives seem to have been incited by the efforts of state officials, such as Indiana Attorney General Steve Carter's press release and website encouraging the consumer filings.[16] Such exhortations warn that the petitions "threaten your privacy" and "would allow telemarketers to avoid state regulation merely by calling from outside the state," or that "telemarketers … want the ability to call people despite the fact they have already signed up to stop telemarketing sales calls." A spokesman for the Wisconsin Department of Agriculture, Trade and Consumer Protection's Consumer Affairs Division even claimed recently that it would be "out of business" if the FCC grants the instant petitions.[17] These assertions are fraudulent. Notable in their absence from these claims of impending doom is any acknowledgement of the substantial protections that will continue to be afforded by this Commission's rules (and those of the FTC), including not only the NDNCR but also company-specific do-not-call rules that can be

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[16] *See* http://www.savedonotcall.com; http://www.savedonotcall.com/upload/assets/pdf/Release.CBA%20Petition.FCC%20Reopens.pdf. This is reminiscent of Attorney General Carter's ironic effort, in the rulemaking leading to the NDNCR, to send unsolicited email to registrants on Indiana's do-not-call list to inveigle them to complain to the FCC about unsolicited calls. *See* Comments of American Teleservices Association ("ATA"), in CG Docket No. 02-278, filed Dec. 9, 2002, at 40 & Exh. 9. *Cf.* ATA Freedom of Information Act Request Regarding Prohibited *Ex Parte* Contacts, filed Aug. 4, 2003 (seeking information about apparently impermissible June 25, 2003, letter by Attorney General Carter to then-Commissioner Kevin J. Martin, which addressed issues in CG Docket No. 02-278, even though FCC had scheduled and given public notice of June 26, 2003, Open Meeting at which the Commission adopted the *NDNCR Order*). *See also* http://www.nj.gov/protectdonotcall; http://www.senate.gov/~kohl/press/05/02/2005202940.html.

[17] Matt Pommer, *Governor Fights Effort to Circumvent State's No-Call Law*, CAPITAL TIMES, July 12, 2005, at 4A. This, of course, is a gross exaggeration, as states retain the ability to enforce the federal rules, as noted *supra* at 7 and note 14. *See also*, *e.g.*, Press Release, Jagdmann Obtains First Virginia Do Not Call Law Judgment (May 23, 2005) (available at http://www.oag.state.va.us/media%20center/Current%20AG%20News%20Releases/052305_Jagdmann_Obtains_First_Virginia_Do_Not_Call_Law_Judgment.htm. *Compare also* Comments by the Attorney General of the State of Wisconsin, in CG Docket No. 02-278, filed Feb. 1, 2005, at 11-16 (discussing state-law-generated expectations and desires of "the people of Wisconsin"), *with* North Dakota's Comment on Freeeats.com, Inc.'s Petition for Expedited Declaratory Ruling, in CG Docket No. 02-278, filed Nov. 8, 2004, at 2 ("North Dakota Opposition") ("it is not public opinion or

used to limit telemarketing from even those callers with whom consumers have an established business relationship. [18] It is hard to believe that these consumers would be so passionate about denial of the instant petitions if they had accurate information.

Finally, we note that, along with the force of "general conflict preemption law" and the extent to which consumer fears stoked by state officials must be taken with a grain of salt, there are additional legal bases for precluding states from regulating interstate telemarketing. For example, state laws that give advantages to in-state teleservices providers over out-of-state entities, such as Okla. Stat. tit. 18, § 552.3(B), violate the Commerce Clause by "mandat[ing] differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." [19] In addition, where state laws interfere with the right of nonprofit entities to engage a telemarketer of their choice to assist fundraising efforts, as does Indiana law for example, [20] they are unconstitutional under the Supreme Court decision in *Riley v. National Fed'n for the Blind of N.C., Inc.*, 487 U.S. 781, 801-02 (1988).

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industry lobbyists which determine whether State law is preempted; it is a function of Congressional intent, nothing more").

[18] *See* 47 C.F.R. §§ 64.1200(c)(2), (d) & (f)(9)(ii); *NDNCR Order*, 18 FCC Rcd at 14070 ("a consumer's do-not-call request terminates the established business relationship for purposes of telemarketing calls"). *Compare* http://www.savedonotcall.com (claiming that the "declaration [sought in the Indiana petition] would allow businesses who believe they have an existing relationship with you to call you").

[19] *Granholm v. Heald*, __ U.S. ___, 125 S.Ct. 1885, 1895 (2005). In some cases there can be little doubt regarding state efforts to disfavor interstate telemarketing that originates outside its borders. *E.g.*, www.savedonotcall.com/upload/assets/pdf/Release.CBA%20Petition.FCC%20Re-opens.pdf (singling out "nine out-of-state banks" for inundation with consumer contacts). *See also infra* at note 27 (regarding back-door effort to sustain enforcement of Indiana telemarketing law against interstate calls regardless of FCC action on instant petitions).

[20] Ind. Code § 24-4.7-1-1 §§ 1(3)(A), 24-4.7-2-9 § 9(2) (imposing restrictions on telephone sales calls defined as, *inter alia*, those made to consumers for the purpose of solicitation of a charitable contribution, except for calls made on behalf of charitable organizations exempt from federal income tax, "but only if … the telephone call is made by a volunteer or an employee of the charitable organization").

II. IT IS NOW CLEAR THAT ONLY BLANKET PREEMPTION OF STATE LAW WITH RESPECT TO INTERSTATE TELEMARKETING CAN EFFECTUATE THE TCPA'S INTENT

Experience with the new NDNCR rules shows that Congress's intent to "protect[ ] the privacy of individuals," while "permit[ting] legitimate telemarketing" fostering "uniformity," and "avoid[ing] subjecting telemarketers to inconsistent rules," [21] cannot be satisfied unless the FCC clarifies the preemptive effect of its rules governing interstate telemarketing. It is instructive in this regard that so many states refuse to join their registries with the NDNCR. *See supra* at 3-4. This includes not only those that have not input their lists into the NDNCR, [22] but also those that share their data but nonetheless continue to require that telemarketers pay the state's registry fee notwithstanding the availability of its data on the NDNCR. But that is just the tip of the iceberg regarding the need for prompt FCC action here.

The burden and impact of attempting to comply with the existing patchwork of divergent state laws and their continuing application to interstate telemarketing already is well documented. Joint Petitioners' Request at 7-32. The requirement to access and pay for numerous state registries in addition to the NDNCR, and for teleservices providers to keep abreast of all states' laws, as TCI can attest, is truly onerous and not at all what Congress had in mind. Congress envisioned that companies conducting interstate telemarketing would have to comply with, and incur the costs of, the federal system of FTC and FCC rules, and at most rules in the one or few states where they are physically located, *i.e.*, only where they make intrastate calls.

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[21] *NDNCR Order*, 18 FCC Rcd at 14034, 14065.

[22] It should be noted that, while the TCPA requires states to incorporate into their registries all numbers on the NDNCR from their state, *see NDNCR Order*, 18 FCC Rcd at 14061 (citing 47 U.S.C. § 227(e)(2)), there is no reciprocal obligation for data to flow in the opposite direction. Accordingly, so long as states believe they can enforce their laws against interstate telemarketing, telemarketers must access both the NDNCR and registries for states that have not shared their data with the FTC, or risk failing to honor do-not-call requests that are on only the state list and subject themselves to state enforcement action. TCI submits in this regard that if the FCC grants the preemptive statement

But where Congress stated that telemarketing regulation is to be "balanced," there is nothing equitable about requiring interstate telemarketers to follow both comprehensive federal rules and multiple sets of state rules, many of which conflict with the federal rules and vary from state to state. TCI's total direct cost for complying with the divergent state rules – even though all or virtually all the calls it places are interstate in nature – is over $40,000 per year before placing even a single call. This amount reflects yearly registration for 41 states and 2 local communities, bonding for 31 states and 2 local communities, agent registrations for 12 states, solicitation and filing fees for 17 states, and do-not call-expense for 15 states. This is many times the anticipated cost of complying with a "unified" federal regime, which currently is capped at a maximum of $11,000 per year (though it will soon rise to $15,400). [23] And this does not take into account administrative costs of maintaining compliance with so many different state laws in addition to the nuances of the federal rules. All these costs, of course, pass on to TCI's clients – including the many non-profit entities that use TCI to raise funds – and ultimately are borne by consumers who purchase products and/or make charitable donations by phone. Moreover, while not a concern for long-established companies like TCI, the cost of adhering to all these rules is a barrier for those seeking to enter the business.

There also is a significant enforcement burden associated with having to comply with dozens of divergent state laws, where the possibility of even innocent mistakes is substantial. The potential fines a company faces, which can be several thousand dollars per call, mount quickly and are in the business-ending category. Moreover, even if a company manages to comply with all the rules, the costs of having to prove that fact to state regulators under inconsis-

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sought by the Joint Petitioners' Request, it could motivate states that have not done so to input their registries into the NDNCR to give full effect to their citizens' preferences regarding unsolicited calls.

[23] *See* 16 C.F.R. § 310.8(c). Additional state costs are all the more onerous since the FTC is raising NDNCR fees at a rate of 40 percent per annum. *See Telemarketing Sales Rule Fees*, 69 Fed. Reg. 45580 (2004); *Telemarketing Sales Rule Fees*, 70 Fed. Reg. 43274 (2005).

tent sets of rules can be significant. It is a time-consuming and expensive process even if a telemarketer is certain that all its calls are permissible under the federal rules and has the necessary records to demonstrate as much.

Without prompt action on the instant petitions, there is little reason to believe the above state of affairs will change so as to alleviate burdens on interstate telemarketers and give effect to Congress's and this Commission's intent regarding the preemptive effect of the federal rules. States have made clear they will not give preemptive effect to the FCC rules and language in the *NDNCR Order* unless the FCC expressly issues a statement preempting the state's law. [24] In fact, states point to the *NDNCR Order*'s establishment of the case-by-case framework for preemption with respect to interstate telemarketing as support – no matter how nominal – for the proposition that their laws can survive even though they differ from the federal rules. [25] In this regard, states misread Section 227(e) as permitting "more restrictive" state laws regardless of whether a call is inter- or intrastate, in complete derogation of the TCPA's plain language. *Id*.

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[24] For example, notwithstanding the clear import of the language quoted above from the *NDNCR Order* and the Commission's warning associated with it, *see supra* at 3, North Dakota claims authority to enforce its laws on grounds that "the FCC has not definitively said that State law different from the TCPA is preempted by FCC regulations." North Dakota Opposition at 1. *See also, e.g.*, Comments of Telelytics, LLC, in CG Docket No. 02-278, filed Nov. 8, 2004, at 2-3 ("Telelytics Comments") (commenting on North Dakota, Florida and New Jersey petitions); National City Mortgage Co. Petition for Expedited Declaratory Ruling with Respect to Certain Provisions of the Florida Statutes, in CG Docket No. 02-278, filed November 22, 2004, at 2-3. *Cf.*, *supra* note 16 (chronicling state efforts to flood FCC with consumer filings in effort to retain power to apply state laws to interstate telemarketing); Press Release, California Firm to Pay $150,000 for Violating State No Call Law Under Agreement with Attorney General Nixon (May 13, 2005) (at http://www.ago.state.mo.us/newsreleases/2005/051305.htm).

The states' fervent oppositions filed in response to the State-Specific Petitions attests to their unwillingness to give the preemptive language in the *NDNCR Order* its intended effect. Indeed, most of the states also asserted that the Commission does not even have jurisdiction to entertain the State-Specific Petitions. While such claims clearly are erroneous for the reasons set forth in the petitioners' replies to them, it is all the more reason why the Commission should grant the Joint Petitioners' Request, which avoids the need to even consider such matters.

[25] *See* North Dakota Opposition at 1; Telelytics Comments at 4.

Indeed, some states have expressed their intent to enforce these laws specifically *because* they depart from the federal rules. For example, New Jersey touts its law, even in the face of the instant petitions, as "aggressively protect[ing] citizens from unwanted telephone solicitations" with "one of the toughest laws in the nation" that it will not "allow … to be undermined." [26] Indiana is so insistent on maintaining its continuing ability to enforce its state laws against interstate telemarketing that legislation evolved that would prohibit the state government from doing business with any entity that does not comply with Indiana's do-not-call law, "even if [the company] complies with the federal do-not-call program." [27] Indiana also all but dares the Commission to give force to the preemptive language in the *NDNCR Order* by brazenly stating that "States May Apply Consumer Protection Regulations to Interstate Telemarketing and the FCC Has No Power to Interfere." [28]

CONCLUSION

States will continue to flout FCC authority unless and until this Commission acts to put some teeth into its promise to "almost certainly" preempt state regulation of interstate telemarketing calls that differs from the federal rules. The Commission has delayed far too long in taking this step when given the opportunity presented by the State-Specific Petitions, leading to the filing of the Joint Petitioners' Request. If the *NDNCR Order* is ever to be given the effect

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[26] Press Release, Acting Gov. Codey Encourages Public Comment on Do Not Call Law (July 22, 2005) (at http://www.state.nj.us/cgi-bin/governor/njnewsline/view_article.pl?id=2645); New Jersey Petition, Exh. 1 at 3; Press Release, Kohl Calls On FCC to Reject Move to Block Wisconsin's Do-Not-Call Law (at http://www.senate.gov/~kohl/press/05/02/2005202940.html).

[27] *See, e.g.*, Lesley Stedman Weidenbener, *Bill Heats Up "Do-Not-Call" Debate*, COURIER-JOURNAL, March 17, 2005, at 1B. This back-door effort to sustain enforcement of Indiana laws to interstate telemarketing, even if this Commission grants the Joint Petitioners' Request, clearly would be invalid under any preemptive statement issued by the FCC, not to mention a violation of dormant commerce clause precepts. *See supra* at 9.

[28] State of Indiana's Reply Comments in Support of its Motion to Dismiss and in Opposition to the Consumer Bankers Association's Petition for Declaratory Ruling, in CG Docket No. 02-278, filed Feb. 17, 2005, at 2.

this Commission intended it to have, the Commission must act promptly to fortify its statements regarding preemption by granting the instant petitions. Accordingly, TCI respectfully submits that the Commission should grant the Joint Petitioners' Request for a declaratory ruling by stating that the FCC's exclusive jurisdiction over interstate telemarketing calls bars states from applying to such calls any state law that differs from the federal rules, and consistent with that ruling should grant each of the State-Specific Petitions.

Respectfully submitted,

TELE-RESPONSE CENTER, INC.

By /s/ Robert Corn-Revere

Robert Corn-Revere
Ronald G. London
Davis Wright Tremaine, LLP
1500 K Street, N.W., Suite 450
Washington, D.C. 20005-1272
(202) 508-6600

Counsel for Tele-Response Center, Inc.

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